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No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

If the laws of more than a dozen States subjected people to serious criminal penalties (including years in prison and substantial fines) for refusing to consent to unconstitutional searches, there can be no doubt that those laws would violate the Fourth Amendment and that this Court's intervention would be imperative. Yet that is precisely what North Dakota, Minnesota, and eleven other States have done, making it a crime for persons suspected of driving while impaired to decline to submit to warrantless chemical tests of their blood, breath, or urine. These criminal test-refusal penalties apply even when the person prosecuted for refusal to submit to a warrantless search was not charged with—or, indeed, was *acquitted of*—driving while impaired.[1] The issue presented by these statutes therefore is a stark one: the criminal penalty here is imposed purely and simply for refusal to surrender the right to resist an unwarranted search.

We show in the petitions in this case and in *Bernard* v. *Minnesota*, No. 14-1470, that these test-refusal statutes are unconstitutional. We also show that the decisions of the state supreme courts in these cases upholding the test-refusal statutes effectively render this Court's decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), a dead letter. In nevertheless opposing review in this case, North Dakota advances three arguments: that the decision below is correct and consistent with this Court's hold-

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[1] This prospect is not theoretical; the North Dakota Supreme Court recently upheld the test-refusal conviction of a motorist who was acquitted of driving while impaired. *North Dakota* v. *Kordonowy*, 867 N.W.2d 690, 692 (2015).

ings; that the decision will not have a significant practical effect; and that the lower courts are not in conflict on the constitutionality of compelled-consent statutes. We address these points in turn.

A. Criminal compelled-consent statutes are unconstitutional.

North Dakota places the defense of its compelled-consent statute on two grounds: that the existence of such a law makes it permissible for a State to *deem* motorists to have consented to searches of their blood, breath, or urine, eliminating any constitutional objection to the search (or to imposition of the test-refusal penalty); and that compelled consent is, in any event, consistent with the Fourth Amendment because it is reasonable. Both arguments are fatally flawed.

1. Consent that is coerced is not effective to surrender a constitutional right.

a. To begin with, "consent" as compelled by North Dakota's statute manifestly is not "consent" in the ordinary—or constitutionally effective—meaning of the word. As we showed in the petition (at 11), consent sufficient to waive a constitutional right must both be "'the product of an essentially free and unconstrained choice by its maker'" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973)) and be revocable. Neither of those conditions is satisfied here.

A motorist in North Dakota *must* consent to submit to a chemical test to obtain a driver's license in the State. As we showed in the *Bernard* petition (at 25 & n.6), the ability to drive is a practical necessity for many people in our society; that need is especially acute in places like North Dakota, where mass transit options are limited and people often must

travel long distances for the necessities of everyday life. In these circumstances, someone who will be denied the ability to drive unless he or she agrees in advance to submit to a chemical search can hardly be said to have "'freely and voluntarily'" consented to such a search. *Schneckloth*, 412 U.S. at 222 (citation omitted).

In opposing review in several of *Birchfield*'s companion cases, North Dakota nevertheless maintains that the consent compelled by its statute is voluntary in the constitutional sense; relying on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State insists that an act is not coerced simply because a person is put to a "hard choice." No. 14-1507, *Beylund* v. *Levi*, Br. In Opp. 17; see *id.* at 11-13, 16-18. That doubtless is so; not all "hard choices" involve coercion. The State's argument, however, misunderstands both *Neville* and the circumstances here.

Neville held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DWI prosecution because *neither* of the options offered the defendant (taking a blood test or having his refusal used against him at trial) raised constitutional concerns (under *Schmerber* v. *California*, 384 U.S. 757, 760-65 (1966), there is no Fifth Amendment bar to compelled blood testing). *Neville* therefore was *not* "a case where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." *Ibid.* But the State here does just what South Dakota did not do in *Neville*: its compelled-consent law is designed to (not-so-subtly) coerce persons to surrender their Fourth Amendment rights by criminally punishing them if they fail to do so. Consent extracted through

operation of that law, on condition of being denied the ability to engage in an activity that is essential for daily life, surely is "the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

And although "[a] necessary element of consent is the ability to limit or revoke it" (*Byars* v. *State*, 336 P.3d 939, 945 (Nev. 2014) (citing *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991))), the "consent" compelled by North Dakota law is *not* revocable. To be sure, the State notes that North Dakota will not force a motorist to submit to a search if the motorist refuses. Opp. 12. But that refusal to permit the search to go forward triggers essentially automatic criminal penalties for test refusal, substituting these refusal penalties for the ones that otherwise might apply under the driving-while-impaired statute. A driver who takes that course may not revoke exposure to the refusal penalties. Such a choice between being searched and being criminally punished for refusing to be searched is no choice at all.

b. As we also showed in the petition (at 9; see *Bernard* Pet. 24-26), these circumstances trigger application of the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); see *id.* at 2596 (citing cases). That is exactly what is happening here: North Dakota is applying "coercive pressure"—denial of permission to drive—to force drivers to "cede [the] constitutional right" to resist a warrantless search. *Id.* at 2596. Of course, it is true that the State need not make driver's licenses available to anyone, but that is no answer to the constitu-

tional claim here; the Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Ibid.*

The State makes no serious attempt to address this issue.[2] Its only response on the merits is the assertion that "[f]or [petitioner] to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he has impliedly consented to it when he obtained his driver's license." Opp. 14. But this argument is circular; we have just shown that petitioner *does* have a constitutional right to resist a warrantless search precisely because compelled consent in these circumstances, resting on the State's effort to coerce surrender of Fourth Amendment rights, is an unconstitutional condition.

The State also contends that this Court approved compelled-consent statutes like North Dakota's in *McNeely*, where it observed that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State," to consent to blood alcohol testing if arrested or otherwise detained on suspicion of drunk driving. Under these laws, withdrawal of consent may lead to

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[2] The State is incorrect in contending (Opp. 13-14) that the unconstitutional conditions argument is not properly presented in this case. That doctrine necessarily is implicated by the holding below that a State may condition the right to drive on submission to a chemical test or to test-refusal penalties, and the North Dakota Supreme Court has in any event now expressly addressed, and rejected application of, the unconstitutional conditions doctrine in this context. *Beylund* v. *Levi*, 859 N.W.2d 403, 409-410 (N.D. 2015), cert. pending, No. 14-1507.

license revocation or use of the motorist's refusal to take the test "as evidence against him in a subsequent criminal prosecution." 133 S. Ct. at 1566. See Opp. 6, 11-12, 14.

The state laws described in *McNeely*, however, are qualitatively different from the *criminal* compelled-consent statutes at issue here. The laws noted in *McNeely* impose administrative penalties for test-refusal, simply suspending or revoking the license conferred by the State if the driver refuses to submit to a search.[3] Even assuming that those laws do not run afoul of the unconstitutional conditions doctrine because they reflect a "'nexus' and 'rough proportionality'" between the state-provided benefit (the right to drive) and the penalty imposed (suspension of that right) (*Koontz*, 133 S. Ct. at 2595 (citations omitted)), it should be obvious that there is a material difference between license-revocation statutes and those that lead to the essentially automatic imposition of serious criminal penalties. In the latter set of statutes, there is a very attenuated nexus, and *no* proportionality, between the benefit (the right to drive) and the penalty (criminal fines and imprisonment for test refusal). In fact, we are not aware of *any* case where this Court has upheld a State's imposition of criminal sanctions to penalize an individual's refusal to surrender a constitutional right. If States may ex-

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[3] As *McNeely* noted, States also have allowed test refusal to be used as evidence of guilt in a prosecution for driving while impaired. But at least as applied in *Neville*, these statutes raise no unconstitutional-conditions concern because they do not require surrender of *any* constitutional right. See *Neville*, 459 U S. at 563. Here, in contrast, the State requires surrender of the Fourth Amendment right to resist a warrantless search from persons who would drive in North Dakota.

ercise such extraordinary power consistent with the Constitution, it should only be with this Court's approval.

2. Warrantless searches may not be upheld on the theory that they are reasonable.

The State's other defense of its statute rests on the contention that the law is constitutional because "North Dakota's implied-consent and refusal statutes further its vital interest in removing drunk drivers from the road." Opp. 15. But this plainly is not a supportable legal argument. As the plurality explained in *McNeely*, "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." 133 S. Ct. at 1564. Specifically addressing "the compelling governmental interest in combating drunk driving," the plurality added: "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id.* at 1565. See *id.* at 1569 (Kennedy, J., concurring in part).

That conclusion followed from the general and settled understanding that a warrantless search is permissible "only if it falls within a recognized exception" to the warrant requirement. *McNeely*, 133 S. Ct. at 1558. See *Bernard* Pet. 11, 21-22. The State, however, does not and could not suggest that any such exception applies here. And on the face of it, this is not a case where "special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner* v. *Railway. Labor Execs.' Ass'n*, 489 U.S.

602, 619 (1989) (emphasis added; citation and internal quotation marks omitted). The State has nothing at all to say in response to these points.

The State also does not advance its argument by emphasizing that its compelled-consent statute applies only to persons who have been arrested on probable cause. Opp. 12. That typically is the situation in test-refusal cases—and was in *McNeely* itself, where the Court *rejected* the State's argument "that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain a blood sample without a warrant." 133 S. Ct. at 1560. In fact, as we show in the petition (at 10), it is fundamental that, probable cause and arrest or not, the interpolation of a neutral magistrate between citizen and law enforcement officer is essential before a search is conducted. See *Schmerber*, 384 U.S. at 770; *Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014). That principle disposes of the State's argument in this case.

B. The holding below undermines this Court's decision in *McNeely*.

South Dakota also appears to question the substantial practical effect of the rule applied below. Opp. 12. But the significant implications of the holdings in this case and in *Bernard* are beyond serious dispute.

As we show in the petition in *Bernard* (at 15), that decision's search-incident-to-arrest holding makes the decision in *McNeely* a dead letter; the dissenters in *Bernard* demonstrate that the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (*Ber-*

nard Pet. App. 22a)—and that will be true even if the holding in *Bernard* is limited to breath tests (see *Bernard* Pet. Repl. Br. 2-3). Neither Minnesota in *Bernard*, nor North Dakota here, denies that this is so. That being the case, whether the holding in *Bernard* is correct is a question of national significance. Many jurisdictions have agreed that warrantless chemical tests may be required under the search-incident-to-arrest doctrine (see *Bernard* Pet. 26-27), and more can be expected to follow Minnesota. The *McNeely* rule will have no practical application in all of these jurisdictions.

North Dakota nevertheless appears to contend that the decision in *this* case will not undermine *McNeely*, evidently because motorists in that State may refuse to submit to a chemical test—albeit on pain of criminal penalties under the compelled-consent statute. Opp. 11. But here again, the State assumes its conclusion. *McNeely* holds that, absent a showing of case-specific exigent circumstances, a motorist may not be subjected to a warrantless chemical test. North Dakota's test-refusal statute is specifically designed to coerce motorists into surrendering that constitutional right. Insofar as the statute's coercive force is effective, it vitiates the right recognized in *McNeely*; insofar as it is not, it subjects motorists to criminal penalties for exercising the right recognized in *McNeeley*.

C. Review by this Court is necessary to resolve confusion in the lower courts and correct repeated misapplication of the Fourth Amendment.

Finally, the State asserts that review is unnecessary because no court has held compelled-consent statutes like North Dakota's unconstitutional. Opp.

7-10. But as we explain in the reply in *Bernard* (at 5-7), this observation does not eliminate the need for review, for several reasons.[4]

First, as we showed in the *Bernard* reply (at 6 & n.4), the courts that have upheld compelled-consent statutes have used differing and inconsistent rationales, at times expressly rejecting each others' approaches as "contrary to basic principles of Fourth Amendment law." *Bernard*, Pet. App. 7a. That the courts cannot agree on the governing principle—and that they believe that the other courts have gotten that principle wrong—shows, at a minimum, that the law is in a state of considerable confusion, while offering substantial reason to believe that the holdings of *all* these courts are incorrect.

Second, the handful of decisions cited by North Dakota hardly show that the law in this area is settled. In fact, at least one of those decisions endorses an approach that is flatly inconsistent with this Court's doctrine. In *Burnett* v. *Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986), the Ninth Circuit relied on *Schmerber* to uphold a compelled chemical test on the theory that "there is no Fourth Amendment right to refuse" such a search.

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[4] In fact, Minnesota's intermediate court of appeals very recently held that a compelled-consent statute *does* violate the Fourth Amendment as applied to *blood* tests, reading the Minnesota Supreme Court's holding in *Bernard* as permitting only unwarranted *breath* tests. *Minnesota* v. *Trahan*, No. A13-0931 (Minn. Ct. App. Oct. 13, 2015). This decision—which leaves undisturbed *Bernard*'s application of the search-incident-to-arrest exception as permitting conviction for refusing to take an unwarranted breath test—cannot be reconciled with the decision below in this case and confirms the pervasive confusion in the courts on the question presented here.

But in *McNeely*, the Court read *Schmerber* to stand for just the opposite proposition: "'absent an emergency, [a warrant is] required where intrusions into the human body are concerned,' even when the search was conducted following a lawful arrest." 133 S. Ct. at 1558 (quoting *Schmerber*, 384 U.S. at 770). If anything, the *Burnett* decision accordingly confirms the need for review by this Court. Meanwhile, the other decisions cited by North Dakota rest on the same set of inconsistent and conflicting rationales that we describe in the *Bernard* reply.

Third, as we also argue in *Bernard*, clarity in the law here is essential. North Dakota acknowledges that compelled-consent statutes are applied many tens of thousands of times each year in jurisdictions across the Nation, and that States are continuing to consider the enactment of such laws. Opp.6-17. All agree that impaired driving is a societal problem of tremendous importance that the States must be able to address with clear, effective, and lawful "rules, procedures, and protocols." *McNeeley*, 133 S. Ct. at 1569 (Kennedy, J., concurring in part). Yet the decision below further confuses the law, failing to grapple with the governing principles articulated by this Court. For all of these reasons, immediate review by this Court of the decision below and of the Minnesota Supreme Court's decision in *Bernard* is warranted.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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